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No. 357

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

THE UNITED STATES OF AMERICA,
Petitioner,

v.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STATEMENT ON BEHALF OF RESPONDENT

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HAROLD F. NONEMAN,
JULIUS M. JACOBS.

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Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit (Appendix A, Petition pp. 7-21) is reported in 279 F. 2d 152. The opinion of the District Court (Appendix A, Petition p. 23) is unreported.

Jurisdiction

The judgment of the Court of Appeals was entered on May 25, 1960. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

Questions Presented

The questions presented involve the deductibility under federal income tax law of contested real estate taxes of the City of New York and the taxability of certain refunds in real estate taxes of the City of New York received by the respondent.

While conducting *bona fide* contests regarding its liability for New York City real estate taxes in excess of the amount it admitted to be correct, respondent (an accrual basis taxpayer) in each of the years 1946-1950, involuntarily paid the contested amounts, pending the outcome of the contest proceedings, in order to avoid seizure of, and the foreclosure of the liens upon, the realty involved. The real estate tax liens could not be suspended, stayed, or in any way removed, either by the contest or otherwise, except by payment.

In 1951 the contest proceedings were settled whereby part of the contested tax liability was determined to be correct, and the balance, which was determined to be incorrect, was refunded to respondent (par. 6 of stipulation, pp. 6a-8a of Joint Appendix).

The specific questions presented are as stipulated (par. 3 of Stipulation, p. 5a of Joint Appendix):

1. Whether under Section 23(c) of the Internal Revenue Code of 1939, the contested real estate tax liability accrues in the year the litigation is settled (1951), or prior thereto, in the year the disputed tax is involuntarily paid (1946-1950) pending the outcome of the contest proceedings; and

2. Whether the amount of contested tax liability determined by the settlement to have been incorrect which was refunded constitutes taxable income in the year of settlement (1951).

Statutes Involved

The statutory provisions involved are Sections 23(c), 41, 42(a), 43, and 48(c) of the Internal Revenue Code of 1939[1] (Appendix B, Petition pp. 24-25).

Statement On Behalf Of Respondent

In Petitioner's statement of the questions presented (Petition p. 2), no indication is given that question 1 as phrased in the Petition involves the accrual of a tax liability which is *denied* and *contested*, or that the unadmitted tax was *involuntarily paid pending the outcome of the contest proceedings.*

The statement of question 2 in the Petition assumes the answer to question 1 to be in Petitioner's favor.

The statement of question 3 in the Petition raises a non existent issue. Paragraph 12 of the amended answer (Joint Appendix, p. 91a) requests that, should Respondent prevail herein, the earlier years be reaudited consistent with the final decision herein;—a remedy that is granted by Sections 1311-1315 of the Internal Revenue Code of 1954, whereunder the Commissioner of Internal Revenue will have one year after the judgment for Respondent becomes final within which to reaudit Respondent's returns for 1946-1950 and assess deficiencies based upon any double deductions taken with respect to the disputed taxes as provided in said Sections 1311-1315. Moreover, this so-called defense was eliminated by paragraph 3 of the stipulation of the parties, *supra.*

The decision of the court below is based on the decisions of this Court in *United States* v. *Anderson,* 269 U. S. 422; *Dixie Pine Products Co.* v. *Commissioner,* 320 U. S. 516;

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[1] Similar provisions are contained in the 1954 Code.

United States v. *Olympic Radio & Television, Inc.*, 349 U. S. 232; and *Lewyt Corporation* v. *Commissioner*, 349 U. S. 237. However, the Court below disagreed with interpretations of these decisions which had been made by the Court of Claims in *Chestnut Securities Co.* v. *United States*, 104 C. Cls. 489, 62 F. Supp. 574, and *Consolidated Edison Co. of New York, Inc.* v. *United States*, 133 C. Cls. 376, 135 F. Supp. 881. Thus the decision of the United States Court of Appeals for the Second Circuit in the instant case is in conflict with the earlier decisions of the Court of Claims.

The Respondent recognizes the fact that the question of when a deduction may be taken of unadmitted and contested taxes which are involuntarily paid pending the outcome of the contest proceedings is of importance both to taxpayers and to the government and that in the interest of uniform administration of the tax laws the present conflict thereon should be resolved by this Court.

Conclusion

By reason of the foregoing, Respondent, while believing that the decision of the Court below is correct, nevertheless joins in the request of Petitioner that a writ of certiorari be issued. It submits, however, that the questions which this Court should consider are stated at page 2, *supra*.

Respectfully submitted,

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Of Counsel:
RICHARD J. SMITH,
HAROLD F. NONEMAN,
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Dated: September 19, 1960.